10 October 1973

MEMORANDUM FOR: John M. Maury

SUBJECT : S. 2542 - Senator Bayh's Bill, "Right of Access of Individuals to Government Records"

Provisions:

S. 2542 is similar to bills introduced by Representative Koch amending the Freedom of Information Act to grant individuals right of access to Government files maintained concerning them. As in the Koch bill, files "specifically required by Executive Order to be kept secret in the interest of the national security" are excluded. This exclusion should cover all Agency operational, personnel and security files.

The Bayh bill contains a provision not contained in the Koch bill. This provision amends Title 18 making it unlawful to record a telephone conversation without the knowledge and consent of all persons being recorded. At present, such recordings are a violation of regulations of the FCC which, according to Bayh, have never been enforced.

Agency Position:

S. 2542, as have the Koch bills, has been forwarded to OGC and OS and is being monitored in OLC should the bill become active.

PLC

would exempt non-gassy mines from having to purchase this "permissible" equipment, which includes the above-mentioned expensive methane monitors, so as to alleviate the burden imposed on frequently already marginal non-gassy mine operators. Non-gassy operators will not be exempt, however, from the expensive and substantial requirements for adequate maintenance, testing, and installation of electric equipment. This amendment, coupled with amendment 14, merely would eliminate the expensive necessity of having to maintain "permissible" equipment possessing little utility in non-gassy operations.

By Mr. BAYH:

S. 2542. A bill to protect the constitutional right of privacy of those individuals concerning whom certain records are maintained, and for other purposes. Referred to the Committee on the Judiciary.

Mr. BAYH. Mr. President, during the 92d Congress, I introduced along with Congressman EDWARD I. KOCH, of New York, broad-based legislation designed to protect the average citizen's right to be free from the unreasonable invasion of his privacy by the Federal Government. In the intervening 2 years, we have learned of shocking violations of the privacy of individuals which have been undertaken by various officials of the executive branch. The strengthening of our citizens' protections in this regard is long overdue. Today I introduce a somewhat modified version of my earlier bill with the hope that the 93d Congress will take quick and effective action. Congressman KOCH has likewise resubmitted similar legislation in the House.

In the field of privacy, reasonable expectations play a very important role. For no matter how carefully and completely we try to analyze the problem, it all boils down to one thing: Americans have—and ought to have—certain broad, general understandings about what part of their personal and business life is public, and what part is private—none of the Government's business, none of anyone else's business.

But expectations of privacy have been shattered in recent years. Recent technological developments have narrowed the sphere of actual privacy by allowing intrusions—by bugging and so forth—into previously protected areas. And the development of the computer has for the first time made it practical to collect, analyze and instantly retrieve vast amounts of information, however gathered. For the first time it is now possible to maintain a dossier on the activities of great numbers of people. These dossiers may be used—or intended—to stifle legitimate political dissent. And even where the actual use of such information is benign, the very existence of it poses a threat to individual liberty.

I believe we must survey the whole area of privacy, the right of the individual not to have certain kinds of information about him gathered at all, or to limit the means by which that information is collected. Who should be permitted to gather information about American citizens? What information is within their legitimate interest? By what means is it appropriate to obtain such information?

And we must also explore the question of confidentiality, the use of information once it has been gathered. Who should have access to it? Should we allow exchanges of information, for example, among Government agencies? What sort of review of information is necessary to make sure that outdated material is removed from the files? And most important, should the individual citizen have a right to review the contents of these files for accuracy and relevancy?

Three years ago we took a great step forward in allowing individuals to have access to financial information about them on file in credit bureaus. Subject to the legitimate—and expressly drawn—demands of law enforcement and national security. I believe we should grant the same rights of access in this area as well.

I believe that we must restore confidence in the American citizen's legitimate expectations of privacy. It is now clear beyond peradventure that we urgently need Federal legislation in this area. I would hope that legislation would be designed to accomplish two objectives.

First, we must define more precisely the nature of each individual's right to a sphere of privacy, a sphere in which he can be free from unwanted intrusion. Any such law should put specific limits on those who would gather and use this information. In short, everyone would know the ground rules and could act accordingly.

Second, a right without an effective remedy is useless. We must provide meaningful tools for enforcing these rights.

That is the kind of legislation which I believe we need. And I believe that we will be able to fashion such legislation.

In the hope of advancing us toward this goal, I am today introducing the Citizen's Privacy Act, legislation designed to meet one of the most serious needs we face in this area. This bill is designed to guarantee any individual about whom the Federal Government keeps records, the right to know that such a record exists; the right to prevent the disclosure of such information outside the agency, or, where such disclosure is expressly required by law, to know when and to whom such disclosure is made; and—most important—the right to see his own file, to make a complete copy of it, and to supplement his record where he believes it is appropriate.

Finally, this bill contains a new provision specifically designed to end an abuse which has recently received wide public attention—the tape recording of telephone conversations by one party without notifying the party to whom he is speaking that such a recording is being made. For some years this has, in theory, been illegal as a violation of the communications tariffs of the FCC, but it has never been enforced.

I believe that all of us have the right to expect that our telephone conversations, whether with the President of the United States or anyone else, are private and should be secure not only from being overheard by others, but also from being recorded, unless both parties consent to such a recording. Section 3 of this bill, therefore, would amend the Federal criminal code to impose serious penalties on those who use recording devices surreptitiously.

I do not propose this bill with the thought that it will be the end of the legislative process. Indeed, I would expect it to be refined and improved. Moreover, I recognize that this bill deals with only a portion of the ground we need to cover. But I hope it will help us as we structure a solution and spur us to move promptly when we complete our gathering of information and our deliberation.

We are quick to rejoice in the freedom we have won. We must be just as diligent to protect and preserve them. As the late Adlai Stevenson once said:

Freedom demands infinitely more care and devotion than any other political system.

That is the kind of effort we must undertake.

Mr. President, I ask unanimous consent that the complete text of the bill be printed in the RECORD at the conclusion of my remarks.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 2542

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) Subchapter II of chapter 5 of title 5, United States Code, is amended by adding immediately after section 552 thereof the following new section:

"§ 552a. Individual records

"(a) Each agency that shall maintain records concerning any individual which may be retrieved by reference to, or are indexed under, the individual's name and which contain any information obtained from any source other than such individual shall, with respect to such records—

"(1) notify such individual by mail at his last known address that the agency maintains or is about to maintain a record concerning said individual;

"(2) refrain from disclosing the record or any information contained therein to any other agency or to any person not employed by the agency maintaining such record, except with permission of the individual concerned or, in the event said individual cannot be located or communicated with after reasonable effort, with permission from members of the individual's immediate family or guardian, or, only in the event that such individual, members of the individual's immediate family and guardian cannot be located or communicated with after reasonable effort, upon good cause for such disclosure: *Provided, however,* That if disclosure of said record is required under section 552 of this chapter or by any other provision of law, the individual concerned shall be notified by mail at his last known address of any such required disclosure;

"(3) maintain an accurate record of the names and positions of all persons inspecting such records and the purposes for which such inspections were made;

"(4) permit any individual to inspect his own record and have copies thereof made at his expense;

"(5) permit any individual to supplement the information contained in his record by the addition of any document or writing containing information such individual deems pertinent to his record, and

"(6) remove erroneous information of any kind.

"(b) Each agency may establish published rules stating the time, place, fees to the extent authorized, and procedure to be followed with respect to making records prompt-

ly available to an individual, and otherwise to implement the provisions of this section.

"(c) This section shall not apply to records that are—

"(1) specifically required by Executive order to be kept secret in the interest of the national security;

"(2) investigatory files compiled for law enforcement purposes, except to the extent that such records have been maintained for a longer period than reasonably necessary to commence prosecution or other action or to the extent available law law to a party other than an agency; and

"(3) interagency or intragency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

"(d) The President shall report to Congress before January 30 of each year on an agency-by-agency basis the number of records and the number of investigatory files which were exempted from the application of this section by reason of clauses (1) and (2) of subsection (d) during the immediately proceding calendar year.

"(e) This section shall not be held or considered to permit the disclosure of the identity of any person who has furnished information contained in any record subject to this section.

"(f) If any provision of this section or the application of such provision to any person or circumstance shall be held invalid, the validity of the remainder of this section and the applicability of such provision to other persons or circumstances shall not be affected thereby."

(b) The table of sections of subchapter II of chapter 5 of title 5, United States Code, is amended by inserting:

"552a. Individual records."

immediately below:

"552. Public information; agency rules; opinions, orders, records and proproceedings.".

SEC. 2. (a) There is established a Board to be known as the Federal Privacy Board (hereinafter referred to as the "Board").

(b) The Board shall consider complaints from any individual that one or more of the requirements of section 552(a) of title 5, United States Code, have not been met, with respect to the records specified in such section, by the responsible agency. The Board upon finding that one or more of the requirements have not been met, shall issue a final order directing the agency to comply with such requirement or requirements, and this order shall be binding on the parties to such a dispute.

(c) The Board shall consist of seven members, each serving for a term of two years, four of whom shall constitute a quorum. Three members shall be appointed by the Speaker of the House, three by the President pro tempore of the Senate, and one by the President. No more than two of the members appointed by the Speaker of the House shall be of the same political party. No more than two of the members appointed by the President pro tempore of the Senate shall be of the same political party. The member appointed by the President shall be from the public at large. Any vacancy in the Board shall be filled in the same manner the original appointment was made.

(d) Members of the Board shall be entitled to receive $100 each day during which they are engaged in the performance of the business of the Board, including traveltime, but members who are full-time officers or employees of the United States shall receive no additional compensation on account of their services as members.

(e) The Chairman of the Board shall be elected by the Board every year, and the Board shall meet not less frequently than bimonthly.

(f) The Board shall appoint and fix the compensation of such personnel as are necessary to the carrying out of its duties.

(g) The Board shall hold hearings in order to make findings upon each complaint, unless there are reasonable grounds to believe that the complaint is frivolous or irrelevant. The Board may examine such evidence as it deems useful, and shall establish such rules and procedures as it determines are most apt to the purposes of this section, including rules insuring the exhaustion of administrative remedies in the appropriate agency.

SEC. 3. (a) Section 2511(2) of title 18, United States Code, is amended—

(1) by striking out in paragraph (c) "(c) It" and inserting in lieu thereof "(c) (i) Subject to the provisions of clause (iii), it"; and

(2) by striking out in paragraph (d) "(d) It" and inserting in lieu thereof "(ii) Subject to the provisions of clause (iii), it".

(b) Section 2511(2)(c) of such title 18 is further amended by adding at the end thereof the following new clause:

"(iii) It shall not be unlawful under this chapter for a person to intercept a telephone conversation by means of a recording device where such person is a party to the conversation, has given adequate notice to all parties to the conversation that the conversation is being recorded, and uses an automatic tone warning device which automatically produces an audible distant signal that is repeated at regular intervals during the course of the telephone conversation when the recording device is in use. The Federal Communications Commission shall prescribe by regulation the characteristics of an automatic tone warning device that may be used in connection with the authorized interception of telephone conversations."

SEC. 4. The amendments made by this Act shall become effective on the ninetieth day following the date of enactment of this Act.

By Mr. KENNEDY:

S. 2543. A bill to amend section 552 of title 5, United States Code, commonly known as the Freedom of Information Act. Referred to the Committee on the Judiciary.

FREEDOM OF INFORMATION ACT AMENDMENTS

Mr. KENNEDY. Mr. President, over half a century ago President Woodrow Wilson expressed the hope for a new era of international diplomacy in which agreements among nations would be "open covenants, openly arrived at." President Wilson believed that an end to secrecy in international relations would help to ensure that agreements among nations would in fact be agreements that served the interests of the people of those nations, and not only the interests of their governments.

The principle for which President Wilson stood may still be considered by many to be impractical in the field of international relations. But the principle that government should be conducted publicly, in the public interest, is not only practical in the field of domestic affairs—it is, as recent events in this country have demonstrated, necessary to preserve a vital democracy and government for the people.

We should keep in mind that it does not take marching armies to end republics. Superior firepower may preserve tyrannies, but it is not necessary to create them. If the people of a democratic nation do not know what decisions their government is making, do not know the basis on which those decisions are being made, then their rights as a free people may gradually slip away, silently stolen when decisions which affect their lives are made under the cover of secrecy. Secret government too easily advances narrow interests at the expense of the public interest. We have seen this with respect to military cost overruns, Watergate, the Russian wheat deal, and secret political contributions. Public government is the best insurance we have that government is being conducted in the public interest.

The first amendment recognizes this principle. That amendment is premised on the public's right to information as being basic to maintaining our popular form of government. The Freedom of Information Act recognized this principle too. Enacted on July 4, 1966, the Act was intended to open the processes of government to public inspection and to ensure that the actions of bureaucracies were easily subject to public scrutiny.

The Freedom of Information Act—FOIA—was designed to reverse earlier law practice under which government officials had considered themselves free to withhold information from the public under any subjective standard that could be articulated for the occasion. The FOIA not only established the general rule that all information in Government files must be made public, with narrowly defined exceptions limiting what may be withheld from public disclosure; for the first time it also provided a remedy against the unlawful withholding of information: The person improperly refused information by the Government could take his case to court.

Although this act was hailed by President Johnson in 1966 as springing from the essential principle that "a democracy works best when the people have all the information that the security of the Nation permits," many observers recognized at the time the difficulties in administering and interpreting the new law. Courts have recognized deficiencies in the legislation, and testimony this year before the Senate Subcommittee on Administrative Practice and Procedure on various proposals to amend the Freedom of Information Act pointed out clearly many areas that require congressional action to insure agency compliance with the law. Witnesses suggested "that the act has become a 'Freedom from Information' law, and that the curtains of secrecy still remain tightly drawn around the business of our Government."

While the problems with administering the provisions of the Fredom of Information Act have long been recognized, recent discussion has centered around the appropriate remedial action by Congress. Last winter, Senator MUSKIE introduced S. 1142, which proposed a number of procedural and substantive changes in the law. This bill was a companion bill to H.R. 5425, introduced by Congressman MOORHEAD, who had developed legislation after extensive hearings by his House subcommittee.

During this past spring three Senate subcommittees joined together to take an intensive look at various aspects of Gov-